



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 16, 2003

Ms. Joanne Wright
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2003-6486

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 187668.

The Texas Department of Transportation ("TxDOT") received a request for information relating to a traffic incident that occurred at a specified location, including all maintenance records for the traffic signals and information containing the name of the manufacturer of the traffic lighting equipment. You assert the requested information is excepted from disclosure under sections 552.103, 552.111, and 552.130 of the Government Code. We reviewed the representative sample of information you submitted and considered the exceptions you claim.¹

Initially, we note the submitted information contains an accident report form, ST-3, governed by chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that, except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date

¹ We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Transp. Code § 550.065(c)(4). This provision requires the Department of Public Safety or another governmental entity to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* The requestor has provided TxDOT with two of the requisite pieces of information. Therefore, TxDOT must release the ST-3 accident report, in its entirety, to the requestor in accordance with section 550.065(c)(4) of the Transportation Code.

Next, we note that Exhibit C is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). This provision makes the completed Traffic Signal Information System Call Log Detail Report in Exhibit C expressly public. Therefore, TxDOT may only withhold this information if it is confidential under other law. You claim sections 552.103 and 552.111 of the Government Code, discretionary exceptions under the Act, which do not constitute other law for the purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive Gov't Code § 552.103), 551 (1990) (statutory predecessor to Gov't Code § 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive Gov't Code § 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, TxDOT may not withhold Exhibit C under section 552.103 or 552.111 of the Government Code.

You also contend that the submitted information is confidential under section 409 of title 23 of the United States Code. This provision states the following:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying [sic] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented

utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409. Federal courts have stated that section 409 excludes from evidence data compiled for purposes of highway and railroad crossing safety enhancement and construction for which a state receives federal funding, to facilitate candor in administrative evaluations of highway safety hazards and to prevent federally-required record-keeping from being used for purposes of private litigation. *See Harrison v. Burlington N. R.R. Co.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992). We agree that section 409 of title 23 of the United States Code constitutes other law for purposes of section 552.022(a) of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also Pierce County v. Guillen*, 123 S.Ct. 720 (2003) (upholding constitutionality of section 409, upon which county relied in denying request under state's Public Disclosure Act).

You state that FM 1898 is part of the National Highway System under section 103 of title 23 of the United States Code and therefore, it is a federal-aid highway within the meaning of section 409 of title 23 of the United States Code. Further, you assert that section 409 of title 23 would protect this information from discovery in civil litigation. After reviewing your arguments and the submitted documents, we conclude that TxDOT must withhold Exhibit C under section 409 of title 23 of the United States Code.

For the remaining submitted information in Exhibit B, we address your assertion of section 552.103 of the Government Code. In relevant part, section 552.103 states the following:

(a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). To secure the protection of section 552.103(a), TxDOT must demonstrate the requested information "relates" to pending or reasonably anticipated litigation. Open Records Decision No. 588 (1991). TxDOT has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing the applicability of section 552.103(a) requires a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). This office has held that a governmental body reasonably anticipates litigation when it receives a claim letter and affirmatively represents to this office that the claim letter complies with the notice requirements of the Texas Tort Claims Act ("TTCA"), Civil Practices and Remedies Code chapter 101, or an applicable municipal ordinance. Open Records Decision No. 638 (1996).

You inform us that TxDOT received a Notice of Claim on May 2, 2003 from the requestor, an attorney who represents an individual involved in the incident at issue. Further, you explain the Notice of Claim meets the requirements of the TTCA. Based on your affirmative representations and supporting documentation, we find you have adequately established that TxDOT reasonably anticipated litigation on July 7, 2003, the date it received the request for information. Additionally, we agree the submitted information at issue relates to the anticipated litigation. Accordingly, we conclude TxDOT may withhold the remainder of the information in Exhibit B under section 552.103 of the Government Code.

However, we note that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Also, the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, TxDOT must release the ST-3 accident report in Exhibit B pursuant to section 550.065(c)(4) of the Transportation Code. TxDOT may withhold the remainder of the submitted information in Exhibit B under section 552.103 of the Government Code. TxDOT must withhold the information in Exhibit C under section 409

of title 23 of the United States Code. As we make this determination, we need not address your other arguments.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Christen Sorrell".

Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 187668

Enc: Submitted documents

c: Mr. Michael E. Henry
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(w/o enclosures)